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## Retroactive Trials and Justice

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# RETROACTIVE TRIALS AND JUSTICE

Stephan Landsman\*

RADICAL EVIL ON TRIAL. By *Carlos Santiago Nino*. New Haven: Yale University Press. 1996. Pp. xii, 220. \$27.50.

Human beings suffer,  
They torture one another,  
They get hurt and get hard.  
No poem or play or song  
Can fully right a wrong  
Inflicted and endured.

History says, *Don't hope*  
*On this side of the grave.*  
But then, once in a lifetime  
The longed-for tidal wave  
Of justice can rise up,  
And hope and history rhyme.

Call miracle self-healing:  
The utter, self-revealing  
Double-take of feeling.  
If there's fire on the mountain  
Or lightning and storm  
And a god speaks from the sky

The innocent in gaols  
Beat on their bars together.  
A hunger-striker's father  
Stands in the graveyard dumb.  
The police widow in veils  
Faints at the funeral home.

So hope for a great sea-change  
On the far side of revenge.  
Believe that a further shore  
Is reachable from here.  
Believe in miracles  
And cures and healing wells.

That means someone is hearing  
The outcry and the birth-cry  
Of new life at its term.<sup>1</sup>

Seamus Heaney's moving words remind us that we live in an extraordinary time when, at sites of grave injustice ranging from the halls of government of Argentina and South Africa to the killing fields of Bosnia and Rwanda, "The longed-for tidal wave/Of justice can rise up,/And hope and history rhyme."

Writers have attempted, in very different ways, to come to terms with the swelling of the tide of justice. For example, the philosopher Alan Rosenbaum, in a recent book about the prosecution of Nazi war criminals,<sup>2</sup> argues that virtually every person implicated in the Nazis' genocidal assault on Europe's Jews should be prosecuted to the full extent of the law.<sup>3</sup> His uncompromising position is "that *not* bringing suspected Nazi criminals to trial is flagrantly immoral and a serious assault on the basic values of civilization and on the conception of a democratic, rights-based society."<sup>4</sup> For Rosenbaum, moral factors always trump "rebuttable considerations like time and resource expenditures."

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1. SEAMUS HEANEY, *THE CURE AT TROY* 77-78 (1990). This excerpt appears on the masthead of the journal *Double Take*.

2. See ALAN S. ROSENBAUM, *PROSECUTING NAZI WAR CRIMINALS* (1993).

3. *Id.* at xi.

4. *Id.* at 1.

Rosenbaum's dismissal of the practical stands in striking contrast to the approach taken by Carlos Santiago Nino's<sup>5</sup> *Radical Evil on Trial*. The late Professor Nino's work is, in essence, a painstaking assessment of the practicality of retroactive justice.<sup>6</sup> Nino traces the pragmatic pursuit of justice in Argentina and a number of other nations as each struggled to replace an oppressive regime with a popularly chosen successor. In doing so, he provides insight into the nature and likely prospects of contemporary efforts to secure justice around the world.

## I. THE STORY OF ARGENTINA

Carlos Nino was deeply involved in Argentina's transformation, in the middle 1980s, from a military dictatorship to a democracy. He was a personal adviser to President Raúl Alfonsín, who oversaw the country's transition. Because of Nino's personal involvement with events and personal relations with some of the actors, passages of his book read more like a memoir than a scholarly assessment. But Nino succeeds in making his retelling of Argentina's story more than the reminiscences of a witness to history. In his hands, Argentina's recent struggles become a didactic experience from which powerful lessons may be derived about the practical prospects for retroactive justice.

In March 1976, the military launched a coup to oust Isabel Perón from the Argentine presidency. Once in power the military junta curtailed civil liberties, dissolved Congress, and replaced independent judges, government officials, and university personnel with ideologically vetted substitutes. Harsh antisubversive legislation was adopted, and a reign of terror was initiated. Alleged subversives and other opponents of the regime were abducted, tortured, and killed — all without the slightest justification or explanation. Many of those who disappeared were never heard from again, and those who were released eventually told of the most brutal mistreatment. Jewish detainees were frequently the target of anti-Semitic atrocities. Eventually, the military claimed that these grievous human rights abuses were justified by the exigencies of Argentina's "dirty war" against terrorism (p. 56). Even the military, however, conceded that the targets of its torture and murder campaign were seldom terrorists but rather "individuals considered

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5. Professor Nino "held a chair in philosophy of law at the University of Buenos Aires and, starting in 1986, was a regular visiting professor at the Yale Law School." P. 207. He died suddenly and tragically in 1993 while the manuscript of this volume was still unfinished. Final preparation of the book was overseen by Professor Owen Fiss.

6. By "retroactive justice," Nino means legal proceedings that were not begun, or even possible, at the time the crimes were committed but have been made feasible by the fall of a repressive regime and its replacement by a democratic successor. P. viii.

threatening to the consolidation of the military's political, social, and economic power" (p. 58).

As time passed, Argentine resistance to the military's abuses grew. A number of human rights groups spearheaded this resistance, including *Servicio de Paz y Justicia*, whose leader, Adolfo Pérez Esquivel, received the Nobel Peace Prize after two years of detention (p. 59). Weekly demonstrations by the *Madres de Plaza de Mayo* underscored, for the world, the fact that thousands had disappeared. From about 1979 on, outside pressure, most particularly from the United States, began to focus substantial attention on military abuses and generate calls for redress and reform (p. 60).

By 1980, the military's grip on Argentina was beginning to slip, due in part to internal and international pressure, but also reflecting the impact of a substantial economic downturn (p. 60). In December 1981, the military replaced its junta leader, General Eduardo Viola, with General Leopoldo Galtieri. The military's position continued to deteriorate, and massive antigovernment demonstrations took place in the early days of 1982. In what seemed a desperate bid for public support, the military launched an invasion of the Falkland Islands, a small chain of British-controlled islands off the Argentine Coast. The British responded to this military adventure by sending an armada to retake the Islands. The Argentine army was overwhelmed and surrendered on June 14, 1982. This military disgrace led to Galtieri's fall and further eroded the military government's standing (p. 61).

By 1983, it had become clear that civilian replacement of the military regime was only a matter of time. The military attempted to insulate its members from liability by declaring that all acts undertaken during the dirty war were committed pursuant to "superior commands" (p. 62) and were, therefore, perfectly lawful as "due obedience" (p. 64). Civilian leaders unanimously rejected this claim, and the Radical Party's candidate, Alfonsín, promised that, if elected, his government would put on trial those who were responsible for gross abuses of human rights. Faced with an enormous pool of potential defendants, Alfonsín labored to identify those who should be targeted for prosecution. He chose to focus on the planners of repression and those who acted beyond the scope of orders, rather than those who had simply abducted and tortured in the regime's name. He made this distinction because he was convinced that otherwise there would be far too many defendants. In Alfonsín's view, this likely would provoke the military into armed resistance. In September 1983, the military promulgated a "self amnesty" law (p. 64). Alfonsín rejected this gambit out of hand, while the other leading candidate, Peronist Italo Luder, seemed to equivocate about its legitimacy. Many in Argentina — including, per-

haps, the military — believed that the Peronists, who had never lost an open election, would take control of the government, thereby foreclosing the prospect of prosecution. Alfonsín, however, surprised the pundits by garnering fifty-two percent of the vote — aided, it would appear, by his strong stand regarding prosecutions.

Once in office, Alfonsín set his government about the task of discovering the fate of all those who had disappeared. He also sought to determine who ought to be tried for human rights abuses. His three fundamental principles were:

1. Both state and subversive terrorism should be punished.
2. There must be limits on those held responsible, for it would be impossible effectively to pursue all those who had committed crimes.
3. The trials should be limited to a finite period during which public enthusiasm for such a program remained high. [p. 67]

Alfonsín seemed to be searching for a realistic prosecutorial agenda that would appear evenhanded — hence the focus on subversives as well as the state — and would balance the demands of justice with the realities of limited judicial resources, the military's violent opposition to widespread punishment, and a predictable decline in public enthusiasm if trials dragged on for too long. While struggling to fix this agenda, Alfonsín also set about reforming the judiciary by removing those judges compromised by adherence to the dubious legal initiatives of the military regime (p. 72).

Political and judicial realities led Alfonsín to curtail the reach and focus of his campaign for retroactive prosecution even further. As a means of garnering military cooperation and re-establishing the armed forces' credibility, Alfonsín arranged to give military tribunals the first opportunity to consider charges against military defendants. These courts had the power to narrow the reach of prosecution substantially. According to Nino, Alfonsín was more concerned with the future than the past — with establishing the rule of law and deterring future violations of human rights. He conceived this as a necessary orientation in a still-divided Argentina facing an ongoing threat of military insurrection. Alfonsín did not want to bury the past, but he was not wedded to seeking criminal convictions of all those involved in past wrongdoing. As Nino summarizes, "While the pursuit of truth would be unrestricted, the punishment would be limited, based on deterrent rather than retributive considerations and on the need to incorporate every sector in the democratic process" (p. 68). This formula reflects the Argentine effort to forge a compromise that would punish grave misdeeds but leave society intact. This approach outraged human rights organizations, which bitterly attacked the government. Their protests had the ironic effect of drawing them into a bizarre alliance with the military, which also vigorously challenged Alfonsín's approach.

Recognizing that a limited number of prosecutions could not deliver a full accounting, Alfonsín determined to serve the cause of truth — or full disclosure — by creating what, in recent days, has come to be known as a truth commission.<sup>7</sup> The task of this executive branch commission, referred to as CONADEP (the acronym of its Spanish title), was to review fully the questions of dirty-war-era torture and abduction. Its report was to be made within 180 days. It was authorized to hear complaints from victims, receive voluntary testimony, and demand written statements from public officials (p. 72). Human rights organizations initially refused to contribute representatives to CONADEP, and the military viewed it with open hostility. Yet the commission moved forward briskly. Complaints poured in, and CONADEP examined thousands of charges. It also inspected 340 clandestine detention centers and struggled tirelessly to secure the identification of the remains of murder victims (p. 79). Eventually, rights organizations began to cooperate, as they observed the seriousness and scope of CONADEP's work. At the end of its allotted time, CONADEP issued a massive report detailing the workings of the military government's torture and disappearance machinery. This report, entitled *Nunca Más* (Never Again), was a powerful indictment of the old regime. CONADEP also presented the courts with 1086 cases for judicial review (p. 80).

While things moved forward rapidly for CONADEP, the military tribunals stalled. Their delays in considering the cases referred to them and their hostility to retroactive justice eventually led to the removal of the atrocity charges from military jurisdiction. In the meantime, armed forces unrest grew and threats of revolt multiplied.

Alfonsín renewed his efforts to narrow the ambit of prosecution. The civilian courts, however, would not cooperate. They asserted jurisdiction over a broad range of the crimes that the prior regime had committed. In April 1985, while disputes raged about a number of other cases, the "big trial" (p. 82) of the leaders of the military junta began. This proceeding was fraught with symbolism as the new judiciary sat in judgment of the leaders of the once all-powerful armed forces. When, at the start of the proceedings, counsel for one of the defendants behaved disrespectfully, his disciplinary arrest was immediately ordered. The message concerning the shift in power could not have been clearer.

The judges presiding at the big trial heard an extraordinary array of witnesses — 832 in all. These included military and civilian

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7. See generally Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, LAW & CONTEMP. PROBS., Autumn 1996, at 81.

leaders, as well as torture victims, forensic scientists — who had examined the remains of victims — and a host of others (p. 84). One troubling aspect of the trial was its seeming disregard of most evidentiary restrictions — especially those concerning relevance and hearsay. The absence of evidentiary constraints meant that there was virtually no way to keep the case focused on the defendants in the dock. Instead, the court was inundated with questionable evidence touching on all aspects of the military's dirty war. Hearsay was in constant use. The court was provided with lengthy secondhand recitations about the work of a number of investigative bodies, including the United Nations Human Rights Commission, CONADEP, and even the U.S. Department of State. In addition, the court heard a great deal of even more troubling hearsay, like the testimony of French Admiral Antoine Sanguinetti who

recounted a meeting with Gen. José Montes [not a defendant at the trial], a foreign minister of the military government, during which he had inquired about the French nuns who had disappeared; Montes replied that it was strange to evince concern about those nuns when a manager of the Peugeot factory had been assassinated by the guerrillas. [p. 83]

This testimony intimated the callousness of all members of the military leadership and associated the defendants — whether fairly or not — with the disappearance and murder of a group of innocent nuns. In the end, a powerful case was made against the defendants, but a great deal of extraneous material was injected into the lengthy proceedings. The army reacted violently to the case. The trial was branded — not altogether unjustly — a “political show” (p. 84), and increasingly strident threats were voiced against Alfonsín's government. The defendants and their counsel complained that CONADEP had framed a case to convict them unjustly — a charge that was hard to refute because of the court's reliance on a summary of CONADEP's work rather than on firsthand evidence. Outside the courtroom, a series of bombings took place and tensions grew.

Concerned because of military unrest, in October 1985, Alfonsín arranged an *ex parte* meeting with the judges presiding over the big trial. At that meeting the President pressed the judges to embrace publicly the principle of due obedience and thereby excuse those below the rank of military leader from retroactive liability (pp. 86-87). The judges rejected this proposal, and in December 1985, found five of the nine big-trial defendants guilty of a host of criminal charges. In March 1986, Alfonsín again met secretly with the judges to urge them to accept the due obedience idea (p. 90). When this gambit failed, the President began to explore other means of cutting off retroactive prosecution. One of these was a proposed executive instruction to military prosecutors that pending

cases against military leaders be concluded speedily and that cases against subordinates be halted immediately with acquittals. This proposal provoked the resignation of Judge Jorge Torlasco of the federal court of appeals and a chorus of protests from human rights organizations (p. 91). It was withdrawn, but not before it had the boomerang effect of stiffening judicial opposition to compromise. All during this period, military resistance and violence escalated, eventually calling into question the survival of the government.

Faced with what he perceived to be irreconcilable pressures threatening to tear Argentina apart, Alfonsín proposed and secured the passage of a “‘full stop’ law (*punto final*)” (p. 92) that imposed a sixty-day cutoff date on the filing of retroactive charges. This law was enacted in December 1986, despite substantial popular opposition. It too boomeranged, resulting in the hasty filing of hundreds of new criminal charges to beat the legislatively imposed filing deadline. During Easter week in 1987, the simmering military unrest came to a boil. Military officers in a number of localities voiced open defiance of the government. Despite Alfonsín’s courageous handling of the immediate crisis — he went unarmed to a rebel base and talked its commander into surrendering — conditions continued to deteriorate (pp. 98-99). The political difficulties of the government were compounded by a sharp economic decline. Alfonsín struggled desperately to rein in the prosecutions. To this end, in June 1987, he convinced the Congress to adopt a due obedience law that protected virtually all soldiers below the rank of commander. As a matter of political strategy, this solution came too late. In September 1987, Alfonsín was voted out of office and replaced by Peronist Carlos Menem. With hyperinflation running rampant, Menem was invited to assume the presidency early. He did so and almost immediately issued pardons that freed many of the military leaders most responsible for the dirty war (p. 103). The following year Menem also pardoned the junta leaders convicted in the big trial.

The lessons to be drawn from the Argentine experience are many, some of them encouraging, but others sobering in the extreme. Democracy did triumph by sweeping away a repressive military regime. At the heart of that triumph was the will of the Argentine people to elect a president — Alfonsín — who promised to prosecute those who had grossly violated human rights. Democracy’s victory was enhanced by the work of courageous political leaders, judges, and prosecutors who pressed cases against torturers and murderers despite profound risks. Perhaps as significant was the vindication of the principle of full public disclosure of the truth about the crimes of the past. By means of a truth commission — CONADEP — Argentineans explored and then publicized all that had happened during the dirty war. CONADEP was an unalloyed



success. It worked speedily, uncovered the true history of a tragic time, and made that history public. It did so without provoking a violent military response. In a dangerously riven society, CONADEP began the process of healing through full disclosure. Its success, and the success of other truth commissions in countries like Chile,<sup>8</sup> has not gone unremarked. In South Africa, Nelson Mandela's government turned to a truth commission to expose and explore the crimes of the apartheid era.<sup>9</sup> This choice speaks volumes about the perceived power of truth as a tool for social reconstruction.

The story is much less encouraging when the efficacy of criminal prosecutions is considered. The criminal process worked too slowly and too elaborately. It raised hopes that it could not satisfy and fears that it allowed to fester. Argentina's big trial was a real victory for the rule of law. But it came at enormous cost. The concept of unbridled prosecution eventually became a stumbling block. The 832-witness proceeding swept virtually every sort of charge and every imaginable kind of proof into the public arena. For the military, this meant that every soldier had become a potential target for prosecution. For the victims, this seemed to signal an opportunity not just for social justice but for personal vindication. For human rights organizations, this appeared to be the beginning of a process to review every wrong done by the armed forces.

Argentina simply could not afford such a broad-ranging process. It had neither the judicial resources nor the political will. Although Alfonsín recognized this, he could never effectively channel the proceedings. Moreover, the big trial invited both friend and foe alike to assume that personalized criminal proceedings would become the norm. Alfonsín tried, through the full stop and due obedience laws, to impose prudential limits. In each case, his effort was seen as too little, too late. In both instances, the government's strategy boomeranged: first fueling a hectic rush to get cases filed, and then a cynicism that paved the way for mass pardons. The government's dilemma led it to dubious ex parte negotiations with the judiciary and indecisiveness that alienated friends and encouraged foes. The trial mechanism and retroactive prosecution are critically valuable tools in reasserting the power of the law, but they are no panacea. Such tools must be used thoughtfully so as not to exhaust the political and social resources of a fledgling democracy. This is not an invitation to abandon trials, but rather a call for their judi-

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8. Nino discusses the work of the Chilean Commission of Truth and Reconciliation. Pp. 37-38; see also José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1434 (1992).

9. See generally Tina Rosenberg, *Recovering from Apartheid*, THE NEW YORKER, Nov. 18, 1996, at 86.

cious use in the service of the broader aim of establishing a decent and durable society.

## II. A TAXONOMY OF ISSUES AFFECTING THE FEASIBILITY OF RETROACTIVE TRIALS

Nino does not rely exclusively on the Argentine experience in attempting to assess the practical prospects of mounting retroactive trials to punish those responsible for massive human rights violations. Rather, he reviews events in more than a score of countries, ranging from post-1945 Germany to 1980s Chile. He concludes that while every nation's situation is unique, there are certain positive factors that facilitate trials as well as certain negative ones that pull in the opposite direction. He lists the following as positive factors:

- coercive nature of the process of transition
- legal discontinuities
- heinousness of the abuses
- absolute and relative quantity of the abuses
- social identification with the victims of the abuses
- sharpness of the trials
- leadership [p. 126]

Nino argues that the virtually ideal setting for retroactive justice was post-World War II Germany. By force of arms, the victorious allies had smashed the Nazi regime completely. The Germans had no means of mounting effective opposition to trials. All the Nazi-era laws and rules that might have been used to justify barbarous and criminal conduct had been swept away. Indeed, the Nazis' overarching racist dogma had been dealt a death blow. The heinous and vast nature of the Holocaust was becoming apparent to all those willing to make inquiry. Although the German people did not embrace Jewish and other victims, the victims were an object of genuine — if belated — humanitarian concern amongst those who prosecuted. The trials, while far from sharply focused, did not become absolutely unwieldy. The first prosecution concentrated, at least nominally, on twenty-four named individuals and moved at a pace that yielded a decision within ten months.<sup>10</sup> Successive trials moved more swiftly still. Towering leaders, particularly the Nuremberg chief prosecutor, Supreme Court Justice Robert Jackson, drove the process toward a decisive and morally justified goal. Yet, despite all this, the prosecutorial process ran out of energy long before all those involved in awful criminal acts had been identified or prosecuted. Even the so-called de-Nazification program faltered

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10. For a detailed description of the Nuremberg proceedings see TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

as the political realities of the Cold War made prosecution less attractive and German reconstruction more important.<sup>11</sup>

Few cases will have as many positive factors as Nuremberg. Indeed, many prosecutions will be inhibited by a range of problems. Nino identifies a series of such negative factors, including:

- consensual nature of the transition
- time span between deeds and trials
- social identification with perpetrators of abuses
- diffusion of responsibility
- cohesion of the perpetrators [p. 127]

If Germany was a virtually ideal setting for retroactive justice, Spain in the 1970s was its antithesis. Throughout that decade, Spain moved at an accelerating pace toward democracy. The death of the Spanish dictator Francisco Franco in 1975 opened the way for full-scale reform. Rather than prosecute Franco-era officials for the suffering they inflicted on Spaniards from 1939 onward, Spanish legislators, in October 1977, “enacted a general amnesty of all politically motivated crimes” (p. 17). The next year a constitution was adopted that firmly closed the door on retroactive justice. Nino suggests that the consensual nature of the Spanish transition — accomplished without force and through incremental steps toward democracy — undermined social support for trials (p. 17). Moreover, the most serious human rights violations committed by Franco’s government had occurred during and shortly after the civil war, which ended in 1939. There was, over time, a blurring of memory as well as an amelioration of divisions between pro- and anti-Franco citizens. Many had lived, worked, and even prospered under the slowly reforming Spanish dictatorship. In the end, there was, according to Nino, a strong social consensus to “let bygones be bygones” (p. 17).

Most shifts from oppressive regimes to democracy fall somewhere between these two extremes. In each case, Nino argues, there will be factors pushing toward and away from criminal prosecution. Nino’s taxonomy suggests that large numbers of prosecutions will seldom be either feasible or popular. The key goal of most states following the fall of an oppressive regime is not trials, but the establishment of a durable democracy. Retroactive prosecution may be an important step in that process, but it is not an end in itself. It must be harmonized with an array of other concerns. While the absolute shattering of the old regime may open the way for broad-based legal proceedings, even here practical limits on the scope and duration of trials will eventually be reached. Increasingly, therefore, truth-commission inquiry has been substituted for

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11. See CAROLYN WOODY EISENBERG, *DRAWING THE LINE: THE AMERICAN DECISION TO DIVIDE GERMANY, 1944-1949*, at 372-74 (1996).

retroactive prosecutions. The goal has not necessarily been to punish past criminal conduct, but rather to publicize it. In such instances, knowledge, rather than retribution, has been judged to be the fundamental building block of the future.

### III. LESSONS ABOUT RETROACTIVE TRIALS THEMSELVES

Despite significant impediments, the world, over the past half century, has had significant experience with retroactive prosecution. Although it appears that the Nuremberg experience has created an enduring expectation that grave human rights abuses will be tried elaborately, the Argentine experience suggests that such trials are not without pitfalls. Nino remarks:

[E]ven when the perpetrators of human rights violations are prosecuted, widespread criticism typically surfaces. Some people are disappointed at the contrast between the expectations of justice and the limited results of the strenuous proceedings. Others feel guilty about the omissions, recognizing that the ensuing power relations were responsible for the trials' shape. Still others feel great hypocrisy when those integrally involved in the abusive regime escape punishment, even retaining important public positions, or when those who were silent in the past suddenly become vociferous advocates of retroactive justice. Some grieve for victims of human rights abuses who were not sufficiently compensated, rehabilitated, or acknowledged. Others feel resentful when the victorious foreigners form tribunals that are biased, or when those foreigners press for rigid standards of justice which their own societies do not follow and which ignore the difficulties of nascent democracy. Still others realize that the popular impact of the trials is rather superficial and fleeting. [pp. 39-40]

Nino's initial observation in this passage underscores the problem of selectivity that the decision to prosecute poses. It is inevitable that a far smaller number will be prosecuted than are actually responsible. The difficulties of gathering proof and mounting trials necessitate narrowing the field of potential defendants. Often, as at the first Nuremberg trial, the defendants are chosen so as to serve a symbolic as well as an individual role in the criminal proceedings; they are tried not only for their own deeds but as proxies for all those who acted similarly. This means that others who may be equally guilty will not be tried. Such an arrangement is obviously open to criticism, but difficult to avoid so long as there are inadequate means to prosecute everyone.

The symbolic overtones of many prosecutorial decisions in retroactive justice cases carry other serious implications for the trials that are mounted. First, a mixed prosecutorial agenda — pursuing both actual and symbolic guilt — will often result in greater reliance on evidence regarding the character of the defendant than otherwise might be the case. Nino explains that this perhaps sur-

prising phenomenon arises out of a desire for retribution, heightened by the representative nature of the defendant and amplified by the felt need to redress all the wrongs perpetrated. As Nino sees it, retribution is only legitimate if deserved by the offender. "[T]he desert of the offender is gauged by his character — i.e., the kind of person he is" (p. 140). Hence, character evidence becomes a critical part of the proof despite many evidentiary systems' strong reservations about such material because of its prejudicial impact.<sup>12</sup> Indeed, concerns about prejudice are most powerful when the crime charged is vast and the defendant is viewed as a representative of a group of malefactors.

A second result of a mixed-agenda prosecution is that when opportunities to bear witness are limited — because of a paucity of trials — and when the proofs presented are designed to serve symbolic as well as defendant-specific purposes, traditional notions of relevance likely will be stretched. Those with particularly poignant stories will be allowed to testify even though what they have to say has little direct bearing on the charges. It may be impossible for humane prosecutors to deny incredibly deserving victims an opportunity to confront their oppressors and address the world regarding their suffering. Moreover, the prosecutors often will either face a surfeit of proof or conceive their role as requiring an expansive presentation. In either case, they will find it exceedingly difficult to winnow their evidence.<sup>13</sup>

A related evidentiary consequence of the mixed-objective prosecution is heightened use of hearsay materials. While many judicial systems impose no bar on hearsay, most view it as an inferior and often troubling form of proof.<sup>14</sup> Yet it is likely to be particularly heavily relied upon in retroactive justice proceedings. Because expanded notions of relevance make the words and deeds of many more actors germane at trial, past writings and summaries of previous inquiries are necessary to allow the introduction of more proof without an endless queue of witnesses. Further, as events of importance to the trial slip further and further into the past, the dulling of

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12. The American position is succinctly set forth in FED. R. EVID. 404(a): "Evidence of a person's character or a trait of character is not [generally] admissible for the purpose of proving action in conformity therewith on a particular occasion . . ."

13. Such forces seem to have been at work in Argentina's big trial, in which an astounding 832 witnesses were called. Many told harrowing stories of torture and loss that were only tangentially related to the defendants in the dock. Even Nino's brief description of the trial makes it abundantly clear that relevance was viewed in the most elastic terms despite the impact of such an approach on the length and sharpness of focus of the trial.

14. See 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 6324 (1997) (discussing, at length, the nature of "the hearsay dangers"). On the European recognition of the dangers associated with hearsay, see MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* 15-16 (1997) (discussing European awareness of and caution in using hearsay materials).

memory and effects of natural attrition make it ever more likely that hearsay will be needed as a substitute for living recollection.<sup>15</sup>

Experience suggests trials are likely to be more effective if they are speedy and sharply focused. While the big trial had substantial value to Argentina, its length and lack of focus afforded the military an opportunity to mount increasingly effective resistance. Nino concludes that "[l]ong proceedings tend to undermine the success of trials, since public support, so vital for the success of the enterprise, may fade with the passing of time, as happened in Argentina after 1986" (pp. 124-25). He is similarly critical of "unwieldy" proceedings (p. 125). The tendency toward symbolism, lengthy witness lists, marginal evidentiary presentations, and hearsay all interfere with expeditious and narrowly focused proceedings, thereby jeopardizing the very cause they seek to vindicate.

#### IV. RETROACTIVE TRIALS IN OTHER CONTEXTS

Nino's taxonomy presumes the recent replacement of an oppressive regime by a democratic successor. As Nino recognizes, this is not the only context in which retroactive trials may arise. They may occur when a particularly odious malefactor is seized long after the conclusion of his criminal career, as was the case with Adolf Eichmann. Alternatively, trials may be mounted at the behest of the outraged world community in response to massive human rights violations, as in the cases of both Bosnia<sup>16</sup> and Rwanda.<sup>17</sup> In these cases, the dynamics of prosecution may differ somewhat from those outlined above.

A number of the positive and negative factors Nino identifies as affecting prosecution will not apply with nearly the same force in a setting like the Eichmann trial or a United Nations Tribunal proceeding. In such cases, no transition to democracy colors proceedings or generates pressure for celerity. The applicable law, rather than serving as a barrier to prosecution, is likely specifically to allow the court to prosecute the alleged acts, as was the situation in the Eichmann trial,<sup>18</sup> or may have even been enacted to found the tribunal.<sup>19</sup> In neither case is a past legal regime likely to create impediments to prosecution. Political constituencies or populations sympathetic to the defendant are far less likely to have any signifi-

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15. For example, Argentina's big trial relied on vast quantities of hearsay from agencies like the United Nations Commission on Human Rights and CONADEP as well as a number of individuals. Pp. 83-84.

16. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/Res/827 (1993) (approving the Yugoslavia Tribunal).

17. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/Res/955 (1994) (approving the Rwanda Tribunal).

18. See The Nazi and Nazi Collaborators (Punishment) Law, 1950, S.H. 57.

19. See *supra* notes 16-17.

cant impact on the society or international body mounting the case. Yet a number of the forces identified by Nino are still likely to be at work and to influence proceedings. In the Eichmann case, for example, awareness of the grievousness of the Holocaust had grown with time, and this played a major role in dictating the course of the prosecution. Similarly, there would never have been an Eichmann trial were it not for the intense identification of the prosecuting state with the victims of Nazi genocide.

The factors of growing awareness of the crime and identification with its victims heightened the symbolic importance of the Eichmann trial for Israelis.<sup>20</sup> Based on Nino's analysis, this would lead one to predict that Israel would mount a sprawling trial, seek to tell the story of the entire Holocaust, disregard evidentiary restrictions, and focus a great deal of attention on Eichmann's character. The Eichmann proceedings bear out these predictions. The Holocaust story and Eichmann's character became central focuses of the case.<sup>21</sup> The prosecution called 121 witnesses who described in detail the entirety of Nazi genocide — whether it had anything to do with Eichmann or not.<sup>22</sup> The government also introduced a mountain of documents, including the forty-two-volume record of the Nuremberg proceedings, the 3500 pages of the defendant's pre-trial interrogation, and more than a half-dozen books.<sup>23</sup> The documentary material was laced with all sorts of hearsay, and the witnesses stretched notions of relevance to the breaking point.<sup>24</sup> Perhaps the best example of the court's attitude toward character evidence was its admission of a 1946 statement by Dieter Wisliceny, who, at the moment of his statement, was trying unsuccessfully to barter information for his life:

I considered Eichmann's character and personality important factors in carrying out measures against the Jews. He was personally a cowardly man who went to great pains to protect himself from responsibility. He never made a move without approval from higher authority and was extremely careful to keep files and records establishing the responsibility of Himmler, Heydrich and later Kaltenbrunner. . . .

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20. See TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 323-86 (Haim Watzman trans., 1993).

21. *Id.* at 350-54.

22. *Id.*

23. 9 TRIAL OF ADOLF EICHMANN RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF JERUSALEM (Trust for the Publication of the Proceedings of the Eichmann Trial in cooperation with the Israel State Archives and Yad Vashem trans., 1992) [hereinafter TRIAL OF ADOLF EICHMANN] (Vol. 9 provides a microfiche of all exhibits submitted at trial).

24. See GIDEON HAUSNER, *JUSTICE IN JERUSALEM* 322-408 (1966), for a detailed description of the Eichmann proceedings. Hausner was the chief Israeli prosecutor in the Eichmann case.

Eichmann was very cynical in his attitude toward the Jewish Question. He gave no indication of any human feeling toward these people. He was not immoral, he was amoral and completely ice-cold in his attitude. He said to me on the occasion of our last meeting in February 1945, at which time we were discussing our fates upon losing the War: 'I will laugh when I jump into the grave because of the feeling that I have killed 5,000,000 Jews. That gives me great satisfaction and gratification.'<sup>25</sup>

Not only were such character analyses regularly admitted, they were zealously pursued by the court. At one point in the proceedings Judge Halevi — one of the members of the three-judge Jerusalem District Court trial panel — asked a key witness, Pastor Heinrich Grüber:

Dr. Grüber, you said that as a man of religion, a clergyman, you are, and always were, interested in the motivation of the people who were involved, and therefore you took notice of the character of the Accused, Eichmann. You said that you encountered the glacial manner of a man who is like a block of ice or marble and with a deep hatred. You said that, at first, you could not understand such a man at all — that is until you experienced the concentration camp. Is this behaviour not like the behaviour of Hitler and his henchmen which he used as an example?<sup>26</sup>

Conviction and punishment had everything to do with being like Hitler. Hence, character proofs of the sort Anglo-American-Israeli evidence rules generally frown upon were energetically sought.

In the end, the problems of duration and focus so prominent in Argentina's big trial also affected the Eichmann prosecution. The trial lasted four months, and the decision took another four months. The trend toward lengthy prosecutions was exacerbated later, when Israel undertook its second Nazi war-crimes trial — that of John Demjanjuk in 1987. That trial lasted more than a year, became preoccupied with questions of the defendant's character, and foundered on misidentification.<sup>27</sup> These Israeli trials, like the ones Nino considers, have a great deal to teach us about the difficulties of retroactive prosecution. As the world moves forward with tribunals for Bosnia and Rwanda and debates the structure of a permanent international court,<sup>28</sup> the lessons to be learned from past experience are especially valuable and deserving of attention.

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25. 1 TRIAL OF ADOLF EICHMANN, *supra* note 23, at 201.

26. 2 TRIAL OF ADOLF EICHMANN, *supra* note 23, at 750.

27. See TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE* (1990), for a detailed description of the Demjanjuk trial.

28. See NOUVELLES ÉTUDES PÉNALES No. 13, *THE INTERNATIONAL CRIMINAL COURT: OBSERVATIONS AND ISSUES BEFORE THE 1997-98 PREPARATORY COMMITTEE; AND ADMINISTRATIVE AND FINANCIAL IMPLICATIONS* (M. Cherif Bassiouni ed., 1997).



## V. ARE RETROACTIVE TRIALS WORTH THE EFFORT AND RISK?

Having reviewed the practical difficulties, Nino eventually turns his attention to the critical question of whether retroactive trials are worth the risk. He begins his examination with a discussion of the work of several scholars who have argued that prosecution is a mistake in settings like Argentina's — and perhaps more generally. Samuel Huntington suggests that when political costs significantly outweigh moral gains, trials should be avoided altogether.<sup>29</sup> According to Huntington, even in the best of circumstances only the very highest leaders of a repressive regime should be tried — and these few only if the cases can be concluded in one year or less.<sup>30</sup> Otherwise, the new government is courting political unrest and eventual blanket pardons.<sup>31</sup>

Nino also considers the arguments of Bruce Ackerman, who, in a volume entitled *The Future of Liberal Revolution*,<sup>32</sup> argues that postrevolutionary democracies often possess substantial moral capital but limited organizational resources. To get bogged down in a series of difficult retroactive trials is to risk squandering what little organizational resources exist, while frittering away moral capital. Ackerman, therefore, argues:

It is simple to squander moral capital in an ineffective effort to right past wrongs — creating martyrs and fostering political alienation, rather than contributing to a genuine sense of vindication. Moral capital is better spent in educating the population in the limits of the law. There can be no hope of comprehensively correcting the wrongs done over a generation or more. A few crude, bureaucratically feasible reforms will do more justice, and prove less divisive, than a quixotic quest after the mirage of corrective justice.<sup>33</sup>

Nino rejects these provocative assessments of the value of retroactive proceedings. He concedes that trials pose immense risks but sees prosecutions — at least in limited numbers — as “great occasions for social deliberation and for collective examination of the moral values underlying public institutions” (p. 131). His sense is that they can provide constitutive moments fundamental to the construction of a democratic tradition. In this view, trials are less important as a means of adjudicating individual guilt than as declarations of social values and concerns. They teach about the scope and nature of atrocities, showcase the rule of law, reduce the

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29. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 231 (1991).

30. See *id.*

31. See *id.*

32. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

33. *Id.* at 72-73.

demand for private vengeance, and orchestrate public deliberations about the benefits of democracy (pp. 146-47).

I find myself troubled by the extent of Nino's emphasis on the symbolic value of trials. They are, and should be treated as, a vital means of establishing the proposition that criminals can expect to be called before the seat of justice. We may not, as a practical matter, be able fully to achieve this end, but our goal ought to be to signal such an intention. While the political symbolism of trials is important, its value may be overstated. Using trials as political or social symbols tends to expand them, to call forth more evidence, more witnesses, more focus on character, and more hearsay. This may amplify public discourse — at least momentarily — but it may also set an untoward precedent. Such an approach intimates that all human rights trials should be conducted this way and is likely to produce slow, expensive, and overtly political proceedings. It would seem to me to be better to encourage the development of fairer, faster, simpler, more efficient trials. The thousands in Rwandan jails need to be tried, but the paraphernalia of Nuremberg is unlikely to be able to do the job. Societies, and even the world at large, may need some modicum of symbolism, but we should not lose sight of individualized justice and its essential tools, including rules of evidence, respect for prudential limits based on the concept of relevance, and a commitment to convict only the right person for the right offense. We should be mindful that justice is dispensed on a continuing basis and that our goal ought to be the creation of a truly workable system that can achieve the rule of law worldwide.

### CONCLUSION

A great deal may be learned from Nino's work.<sup>34</sup> First, reality counts. In thinking about retroactive justice it is important to consider carefully the scope and focus of the prosecutions to be mounted. Sprawling, unfocused cases that pursue goals other than

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34. Unfortunately, it must be noted that Nino's book is seriously marred by editorial failure to identify and correct glaring lapses in spelling, grammar, and printing. Perhaps the lapses may be explained by Nino's untimely death during the editorial process. Still, there seems little excuse for the Yale University Press's editors not catching the misspelling of the word "planned" as "planed" (p. ix), for describing the vast number of Stalin's victims as "unaccountable" rather than innumerable (p. 21), for using the word "then" instead of "them" (p. 136), and for dropping what appears to be at least one whole line of text (p. 161). This list of errors is far from exhaustive. It should be noted that there are also substantive errors in the text. On page 83, for example, "Erik [sic] Stover" is described as "the director of the American Science Association." In reality Eric Stover was Staff Officer for the Committee on Scientific Freedom and Responsibility of the American Association for the Advancement of Science. See *THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS* at xiii (Eric Stover & Elena O. Nightingale eds., 1985). Surely the job can be done better. A book with so many important things to say deserves better editing and proofreading.

the conviction of a particular defendant for a specified crime are likely to generate serious justice-system problems. If not adequately addressed, these problems may defeat the prosecutorial effort. Second, alternatives to trials such as truth commissions may sometimes serve the interests of society more effectively than trials. Finally, if trials are to take place, they should be fast, simple, clearly focused, and sensitive to questions about the quality of the evidence. All these points need to be kept in mind as the world inches toward the monumental step of fashioning an international criminal court.